No. 87-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents' briefs in opposition confirm that a writ of certiorari should issue in this case.

1. Respondents do not dispute the overriding national significance of the decision below. Nor could they do so, given the demonstrable impact of the decision on the long-standing structure of the nation's financial services industry. *See* SIA Pet. 11-15. Respondents instead attempt to confine the scope of this case solely to underwriting government securities (Fed. Opp. 7-8), but its reach is far broader. By misreading Section 20 of the Glass-Steagall Act to exclude government securities, and misconstruing that section's "engaged principally" restriction, the decision below authorizes bank affiliates to rank among the na-

tion's major underwriters of *other* securities as well. *See* SIA Pet. 20, 23-24. As the Board majority itself emphasized, this case involves "the first major entry of banking organizations into the field of underwriting and dealing in *ineligible* securities." 134a (emphasis supplied).

It is simply preposterous, we submit, to conclude that the Congress which enacted the Section 20 *prohibition* in order to "put[ ] an end" to bank securities affiliates[1] imagined the section would be a *permission* for banks to affiliate with ineligible securities operations as large as those of PaineWebber or to absorb securities entities as extensive as Merrill Lynch. Yet, as respondents in effect concede, that would be the result of Glass-Steagall if the decision below were permitted to stand. *See* SIA Pet. 14-15.

2. Respondents claim this patently illogical result is required, because they "cannot imagine" any reason why the Glass-Steagall Congress would have restricted bank affiliates from engaging in activities expressly permitted to banks themselves. Fed. Opp. 9. In fact, Congress had every remedial reason to do so with respect to dealing in government securities. By the 1930s, affiliates originally established by banks merely as government securities dealers (*see* SIA Pet. 20; 31a) had expanded their operations so far into bank-prohibited securities activities that they became known as the "back door in banking."[2] Congress was keenly aware of that evolution. Asked specifically during the Senate debates whether bank securities affiliates could continue if they dealt *only* in government securities, Senator Glass answered, "I am objecting to affiliates *altogether*," explaining further that he objected to "back-door arrangement[s]" through which banks engaged in unauthorized businesses and wanted to "make it impossible" for that to recur. 76 Cong. Rec. 2000 (1933) (emphasis supplied); *see* 28a.

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1 77 Cong. Rec. 3917 (1933) (remarks of Rep. Luce, one of the House managers of the Glass-Steagall bill).

2 W. Peach, *The Security Affiliates of National Banks* 177 (reprinted ed. 1975).

Section 20 by its terms thus severely restricted bank affiliates from underwriting any "securities," government or otherwise, thereby ensuring that bank affiliates could not use a base of government securities business again to push open the "back door in banking"—or, as Chairman Volcker aptly put it in dissent here, "to bootstrap securities activities that Congress clearly wished to restrain or prohibit." 137a n.2. The decision below, by interpreting Section 20 to permit just the sort of "bootstrap[ping]" Congress meant to prohibit, turns the congressional mandate on its head.

3. To rationalize this statutory reversal, respondents must resort to rearguing that the term "securities" in Glass-Steagall is ambiguous—an argument the Court repeatedly has rejected. *See* SIA Pet. 17-18. Respondents cite "differen[ces]" among sections of the Act as supposedly creating ambiguity concerning government securities. Fed. Opp. 9. These differences actually demonstrate its absence. In Section 16 Congress prohibited banks from underwriting any "securities," but expressly exempted government securities from that proscription. Again, Congress amended the underwriting prohibition of Section 21 in 1935 specifically to incorporate the Section 16 exemption for government securities, showing, as one court has put it, that "Congress knew how to indicate that a section of the Act was intended as a specific exception to another section."[3] By contrast, Congress has not—either initially or by any amendment—"indicat[ed]" the term "securities" in Section 20 is to be qualified in any way. The contrary conclusion below conflicts directly with this Court's instruction that the prohibitory terms of the Act are to be applied "as they were written." *ICI* I, 401 U.S. at 639; *see SIA* I, 468 U.S. at 149-52.

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3 *Investment Co. Inst.* v. *FDIC*, 815 F.2d 1540, 1547 (D.C. Cir.), *cert. denied*, 108 S. Ct. 143 (1987).

As the Senate Report explained, the amendment to Section 21 in 1935 was "necessary" to make clear that nonmember banks, which were not covered by the Section 16 exemption but were within the Section 21 prohibition, could underwrite government securities. S. Rep. No. 1260, 73d Cong., 2d Sess. 2 (1934). Contrary to respondents' speculation (Fed. Opp. 9 n.6), it had nothing to do with Section 21 being a criminal provision.

4. Respondents all but concede that the Board for over 50 years has read the term "securities," as used in Section 32 of the Act, to *include* government securities. *See* SIA Pet. 21-23. Respondents incorrectly suggest this interpretation can be brushed aside as a regulatory relic. Fed. Opp. 11 n.9. Not only is the Board's own contemporaneous understanding of the Glass-Steagall Act—a statute the Board helped draft and amend—especially important,[4] but the Board has also reiterated the same view, without modification, throughout more than five decades, up to and including today. *See* Regulation R, 12 C.F.R. § 218.2 (1988).

Only four years ago, the Court in *SIA* II held the Board's interpretation of terms in Section 32 equally applicable to the parallel terms in Section 20 (*see* SIA Pet. 22), having heard the Board urge just that.[5] Yet, the Board majority here interpreted the term "securities" in Section 20 exactly opposite to the Board's interpretation set forth in the *same* Section 32 regulation relied upon in *SIA* II. More than a matter of administrative arbitrariness, which certainly it is (15a-17a), the majority's ruling raises important questions concerning administrative disregard of representations made to, and instructions received from, the Court. Again, review is warranted.[6]

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4 *E.g.*, *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969).

5 In *SIA* II, the Board represented that its "longstanding and virtually contemporaneous" Regulation R under Section 32 "applies with equal force" to Section 20, "a closely related provision of the same Act." Brief for the Federal Respondents at 35-37, *SIA* II, 468 U.S. 207 (1984) (No. 83-614).

6 The Board suggests (Fed. Opp. 11 n.9) that it has not "treated" government securities operations as subject to the restrictions of Section 32 but omits to say that such "treat[ment]" has been an exercise of its express *exemptive* authority under Section 32—authority the Board admittedly lacks under Section 20—and not an expression of the Board's view of a matter to which Section 32 "by its terms . . . does not apply." 12 C.F.R. § 218.2 & n.1. *See* SIA Pet. 22-23; 16a-17a.

Respondents also refer to recent rulings in which the Board permitted bank holding company subsidiaries to carry on government securities activities. Fed. Opp. 11; Bank Opp. 4. But those rulings reflected

5. Respondents cite current legislative deliberations in an effort to avoid further review, even asserting the Court's exercise of its jurisdiction to construe the law would somehow "interfere" with congressional debate. Fed. Opp. 13; *see* Bank Opp. 10. To the contrary, not only is ultimate congressional action uncertain,[7] but the Court's teaching as to proper construction of the Act surely would be of aid to the legislative process. As Representative Markey, Chairman of a subcommittee now considering Glass-Steagall issues, recently stated concerning this case:

> I would urge the Court not to decline review on the basis of a legislative contingency. I have been forthright in my statements that it is time that Congress address the pressing issues raised by the Glass-Steagall debate. I do not, however, think that the Court should concede its own important interpretive role in the event that Congress does not have the opportunity to resolve these issues this year.[8]

CONCLUSION

Absent review, the decision below will shatter the structure Congress designed for the financial services industry over the last half century. The government regulators, the banking in-

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only the Board's policy determination under the Bank Holding Company Act; the rulings did not even mention, much less determine, *any* issue under the Glass-Steagall Act.

7 *See* SIA Pet. 16 n.23 (noting that in 1984 the Senate, but not the House, had passed legislation similar to that now pending).

8 134 Cong. Rec. E 1591 (daily ed. May 18, 1988). With specific reference to the expiration of the congressional moratorium of the effective date of the Board's ruling, Representative Rinaldo, the ranking Republican on the same subcommittee, stated, "I would hope that the Court would not read anything into [that expiration]"; it "indicates nothing more than that the legislative efforts to modify or repeal Glass-Steagall have provoked enormous debate." 134 Cong. Rec. E 1636-37 (daily ed. May 19, 1988). *See also* 134 Cong. Rec. E 1473 (daily ed. May 10, 1988) (Remarks of Rep. Morrison).

dustry and the securities industry are all before the Court. A writ of certiorari should issue to review the decision below.

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